

No. 17-6939

IN THE
SUPREME COURT OF THE UNITED STATES

In re MASAO YONAMINE,

Petitioner,

vs.

KATHLEEN G. GERBING, Superintendent of Otisville
Correctional Facility, Otisville, NY 10963, Under
The jurisdiction Of Custody/Control Of New York
State Corrections and Community Supervision,

Respondent.

MOTION FOR AN ORDER OF REHEARING PURSUANT TO THE
SUPREME COURT'S RULE 44 OF THE UNITED STATES

MOTION FOR AN ORDER OF REHEARING

Masao Yonamine 88A7233
Petitioner Pro se
Otisville Corr. Facility
P.O.BOX 8
Otisville, NY 10963

QUESTION PRESENTED

POINT I

PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 USC 2241(a)(c)(3) SUBMITTED AGAINST THE PERSON(S) WHO HOLDS PETITIONER IN WHAT PETITIONER CLAIMS THAT HE IS UNLAWFULLY DETAINED OR IN CUSTODY RESTRAINED OF HIS PERSONAL LIBERTY IN VIOLATION OF THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES, BY PURSUING THE VALIDITY OF THE JURISDICTION OF HIS DETENTION TO OBTAIN HIS LIBERTY PURSUANT TO UNITED STATES CONST. Art.1, Sec.9 cl (2) IS THE PROPER APPLICATION ?

POINT II

MAY A FEDERAL COURT ENTERTAIN AND DETERMINE THE MERIT OF A STATE PRISONER'S APPLICATION FOR HABEAS CORPUS RELIEF FROM A VOID JUDGMENT, ILLEGALLY IN CUSTODY RESTRAINED OF HIS PERSONAL LIBERTY IN CONTRAVENTION OF THE CONSTITUTION OR LAWS, OR TREATIES OF THE UNITED STATES, EVEN THOUGH PRISONER EXHAUSTED A FORMERLY AVAILABLE STATE REMEDY AND THERE IS NOW NO STATE REMEDY AVAILABLE.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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COURT'S DECISION

On January 8, 2018, This Honorable Court denied Petitioner's Petition for a Federal Writ of Habeas Corpus pursuant to 28 U.S.C. Sec.2241(a)(c)(3) as docket No.17-6939 without an opinion. See appended hereto as APPENDIX A.

OPINION BELOW

Please see Petitioner's Application for a Writ of Habeas Corpus pursuant to 28 USC Sec.2241(a)(c)(3) dated Nov.17/2017 and docket on December 1, 2017, as No.17-6939 at page 1-2 submitted in this Honorable Court.

JURISDICTION

The Jurisdiction of this Court has been invoked by Petitioner pursuant to Art.III Sec.2, cl.(2) of the United States Constitution; U.S. Constitution Art.1, Sec.9 cl.(2); 28 USC Sec.2241(a)(c)(3); 28 USC Sec.2243; 28 USC Sec.1651(a)(b); Rule 22 of the Supreme Court of the United States; and now pursuant to Rule 44 (Rehearing).

Pursuant to 28 USC s 2242, the "reasons for not making application to the Dist. Court of the district in which the applicant is held," is that Petitioner previously submitted twice of his Application under 28 USC s2241(a)(c)(3) to the District Courts "within theirs respective jurisdiction," and said Courts declined to conduct a hearing to determine of the substance of the Petitioner's application pursuant to 28 USC 2243 whether or not Petitioner was unlawful convicted, sentenced, detained or unlawful in custody restrained of his personal life and liberty in violation of the Constitution or laws or treaties of the United States.

QUESTION PRESENTED

POINT I

PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 USC 2241(a)(c) (3) SUBMITTED AGAINST THE PERSON(S) WHO HOLDS PETITIONER IN WHAT PETITIONER CLAIMS THAT HE IS UNLAWFULLY DETAINED OR IN CUSTODY RESTRAINED OF HIS

PERSONAL LIBERTY IN VIOLATION OF THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES, BY PURSUING THE VALIDITY OF THE JURISDICTION OF HIS DETENTION TO OBTAIN HIS LIBERTY PURSUANT TO UNITED STATES CONST. Art.1, Sec.9 cl.(2) IS THE PROPER APPLICATION ?

Please, with respect to this QUESTION PRESENTED POINT I, see Petitioner's Application for a Writ of Habeas Corpus pursuant to 28 USC Sec.2241(a)(c)(3) dated Nov.17/2017 and docket on December 1, 2017 as No.17-6939 at page 10-17 submitted in this Honorable Court.

POINT II

MAY A FEDERAL COURT ENTERTAIN AND DETERMINE THE MERIT OF A STATE PRISONER'S APPLICATION FOR HABEAS CORPUS RELIEF FROM A VOID JUDGMENT, ILLEGALLY IN CUSTODY RESTRAINED OF HIS PERSONAL LIBERTY IN CONTRAVENTION OF THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES, EVEN THOUGH PRISONER EXHAUSTED A FORMERLY AVAILABLE STATE REMEDY AND THERE IS NOW NO STATE REMEDY AVAILABLE AND NO FEDERAL LOWER COURT REMEDY AVAILABLE ?

Please, with respect to this POINT II, see Petitioner's Application for a Writ of Habeas Corpus pursuant to 28 USC Sec.2241(a)(c)(3) dated Nov.17/2017 and docket on December 1, 2017 as No.17-6939 at page 17-20.

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution Art.1, Sec.9, cl(2) Provides:

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless When in cases of Rebellion or Invasion the public Safety may require it."

United States Constitution Art.III Sec.2 cl(2) Provides in part:

The Supreme Court shall have Appellate Jurisdiction, both as Law and Fact,"

United States Constitution, XIV Amendment, Provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Congress shall have the power to enforce, by appropriate legislation, the provision of this article.

United States Constitution, V Amendment Provides:

...;"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;".....

United States Constitution, VI Amendment, Provides:

"In all criminal prosecution, the accused shall enjoy the right to a public trial, by an impartial jury of the state and district wherein the crime shall have been committed..., and to have the assistance of counsel for his defense."

United States Constitution, VIII Amendment, Provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 28 USC Sec.2241, Power to grant Writ, Provides in Part:

(a) Writs of Habeas Corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(3) He is in custody in violation of the constitution or laws, or treaties of the United States.

Title 28 USCA Sec.2243, Issuance of Writ; return, hearing, decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

.....

The court shall summarily hear and determine the facts and dispose of the matter as law and justice require.

Title 28 USCA 2254, State Custody; remedies in Federal Courts Provides:

(a) The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the Courts of the State; or

(B)(i) there is an absence of available State correction process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

Criminal Procedure Law Sec.470.35(1). Determination by Court of Appeals From Order of Intermediate Appellate Court;Scope of Review. Provides in Part that:

1. Upon an appeal to the court of appeals from an order of an intermediate appellate court affirming a judgment, sentence or order of a criminal court, the court of appeals may consider and determine not only question of law which were raised or considered upon the appeal to the intermediate appellate court, but also any question of law involving alleged error or defect in the criminal court proceeding resulting in the original criminal court judgment, sentence or order, regardless of whether such question was raised, considered or determined upon the appeal to the intermediate appellate court.

CRIMINAL PROCEDURE LAW Sec.310.30 Provides:

"At any time during its deliberation, the jury may request the court for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any matter pertinent to the jury's consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper. With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text to any statute which, in its discretion, the court deems proper."

PRACTICE COMMENTARIES
BY PETER PREISER

The Court of Appeals has furnished the following model for procedure that should be followed when a deliberating jury requests additional information.

(J)urors' inquires must generally be submitted in writing, sincewritten communication are the surest method for affording the court and counsel an adequate opportunity to confer. Further, whenever a substantive written jury communication is received by the judge, it should be marked as a court exhibit and, before the jury is recalled to the courtroom, read into the record in the presence of counsel. Such a step would ensure a clear and complete record, thereby facilitating adequate and fair appellate review.

After the contents of the inquire are placed on the record, counsel should be afforded a full opportunity to suggest appropriate responses.....(T)he trial court should ordinarily appraise counsel of the substance of the responsive instruction it intends to give so that counsel can seek whatever modifications are deemed appropriate before the jury is exposed to the potentially harmful information.

Finally, when the jury is returned to the courtroom, the communication should be read in open court so that the individual jurors can correct any inaccuracies in the transcription of the inquire and, in cases where the communication was sent by an individual juror, the rest of the jury panel can appreciate the purpose of the court's response and the context in which it is being made. People v. O'Rama, 78 N.Y.2d 270, 277-278, 574 N.Y.S.2d 159, 5 N.E.2d 189 (1991). Note that it is particularly important to afford counsel access to the juror's note and an opportunity to suggest responses to thereto (id., at 279; People v. Cook, 85 N.Y.2d 928, 629 N.Y.S.2d 1000, 650 N.E.2d 847 (1995)).

C.P.L. Sec.260.20 JURY TRIAL: DEFENDANT'S PRESENT AT TRIAL Provides:

"A defendant must be personally present during the trial of a indictment";..

McKinney' Cons. Laws of New York, Book 1, Statutes Sec.171 Provides:

F. MANDATORY AND DIRECTORY PROVISIONS Sec.171, GENERALLY

MANDATORY provisions of a statute go to the jurisdiction of the person acting, while directory provision are mere instruction or direction.

"In the construction of statutes, mandatory provisions, generally speaking are those which are essential. They go to the jurisdiction or authority of the person acting, and a compliance with them is a condition precedent to the validity of the action or determination under it. **Where they prescribe a certain mode of procedure it must be strictly pursued, otherwise the whole proceeding is thereby rendered void.**" See, e.g. People v. Meyers, 207 Misc. 431. (1955) (case reversed and the information dismissed); People ex rel. Lawton v. Snell, 216 N.Y. 527 (1916)(case reversed and relator discharged); Francis v. Fonfara, 303 Conn. 292, 33 A.3d 185 (2012) (Writ of error granted, judgment reversed).

New York State Constitution Art.1 Sec.4 Habeas Corpus Provides:

"The privilege of a writ or order of Habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety require it."

New York State Constitution Art.1 Sec.6 Provides in Part:

"In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature,"..... "No person shall be subject to be twice put in jeopardy for the same offense." ... "No person shall be deprived of life, liberty or property without due process of law."

New York State Constitution Art.1 Sec.11 Provides in Part:

"No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, or religion, be subjected to any discrimination in his civil rights by any other person....., or by the state or any agency or subdivision of the state."

New York State Constitution Art.1 Sec.5, Provides:

Excessive bail shall not be require nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

**CLEAR SUBSTANTIAL EVIDENCE OF THE FAILURE TO DISCLOSE THE JURY'S NOTE
AS APPEARED ON THE FACE OF THE TRIAL'S RECORD**

After the jury had been sent out to deliberate, the following proceeding with respect to the jury's note request occurred:

THE COURT: Okay, remand.

(T.502, 6/15/88)*

(Whereupon, the jury deliberated and at 3 p.m. returned to the courtroom.)

(T.503, 6/15/86)

THE CLERK: This will be court Exhibit 2. They sent out a notice earlier for court exhibits.

THE COURT: The first one is for evidence, that is Court Exhibit 1.

COURT OFFICER: Jury entering.

THE COURT: The first request was for evidence which you received, did you not?

JUROR # 1: Yes

THE COURT: The second one market Court Exhibit 2 is number one, please bring in the medical examiner's testimony regarding bullet wound to Alice's head. Also, all bullet wounds to John Cody's body.

Number two, Please bring in testimony of Dobson, EMG, relating to the positioning of cars as he witnessed it.

Now, I don't know if you-- if that is what you want, because apparently, the Reporter in going through the notes, does not find a great deal of information about that from Dobson. However, we will read whatever it is to you.

(T.504, 6/15/88)

On the second question the Court Reporter says there is no testimony relating at least from Dobson relating to the position of the cars.

Now, there was testimony if you recall by Washington, McPartland and maybe those are people you want to hear from, I don't know. But apparently, on Dobson, there isn't too much.

(Whereupon, the appropriate testimony was read back by the Reporter:)

THE COURT: All right. Ladies and gentlemen, that's what we have for you at the moment. You have to go back in and regroup and see what if anything else you want.

Take the jury out.

(Whereupon, the jury left the Courtroom at 3:10 p.m. and then the following took place in chambers:)

MR. LAURIA: If I may, I have to respectfully except to the Court naming other witnesses to this jury. The

question covered Mr. Dobson and there was no testimony. For the Court to suggest that maybe they are considering Mr. Washington or Mr. McPartland, I have to strenuously object to that and-

(T.505, 6/15/88)

THE COURT: You have your exception.

MR. LAURIA: Thank you much very much.

MR. ZUCKERMAN: For the record, I think Mr. Lauria is in no position to object. It was he who shouted out in front of the jury perhaps the jury would like to listen to the cross examination.

MR. LAURIA: There was more testimony concerning--

MR. ZUCKERMAN: There is more testimony concerning the position of the cars not from Dobson.

THE COURT: I don't have any exception to your suggesting that they listen to cross examination.

MR. LAURIA: I understand. I appreciate that.

(Whereupon, a recess was taken while the jury deliberated and we resumed at 6:30 p.m..)

(T.506, 6/15/88)

THE COURT: Let the record show that we have a Court Exhibit market Court Exhibit 3. The jury wants to have reread the testimony of Nathan Washington, Officer McPartland, Mrs. Gregoretti, Mr. Dobson. We have all of it except Mrs. Gregoretti's, which we can have first thing in the morning.

And then we wanted to clarify the judge's Charge pertaining to murder two and the criteria, thereof as well as manslaughter and the five criteria.

We don't have anything as such as five criteria, I have worked it out where with the three murder criteria plus two seem to be the basis of the emotional distress affirmative defense.

Extreme emotional distress offense. I think we come up with five which might satisfy them.

So, we will put it in that context to them. Bring out the jury.

COURT OFFICER: Jury entering.

THE COURT: Mr. Barry, would you give us Nathan Washington's testimony.

(T.507, 6/15/88)

(Whereupon, the testimony of Mr. Washington was read by the Reporter.)

THE COURT: Can we have the testimony

of Officer McPartland.

(Whereupon, the testimony of Mr. McPartland was read by the Reporter.)

THE COURT: Which don't have Mrs. Gregoretti's out yet, but we do have Mr. Dobson's. We will give you Ms. Gregoretti's tomorrow morning first thing. Let's do Mr. Dobson.

Remember at any time during the read back any portion of it satisfies what you are looking for, you can indicate that to the Court.

You have may proceed.

(Whereupon, the testimony of Mr. Dobson was read by the Reporter.)

THE COURT: Ladies and gentlemen, I told you that Mrs. Gregoretti's testimony will be given to you first thing in the morning.

Petitioner respectfully prays for a rehearing of this case before a full bench. This petition is made because his case has not received the full consideration that justice require due to the affirmance of the judgment below and, now this Honorable Court on 1/08/2018 under docket No.17-6939 denied his petition pursuant to 28 USC Sec.2241(a)(c)(3), in which petitioner has been unlawful over 31 years detained or in custody restrained of his personal life and liberty in violation of the constitution or laws of the United States.

Petitioner's claim is made that petitioner was denied due process of law under 14th Amend. and to have a fair trial by impartial jury, which affected all of the Applicable Constitutional and Statutory Provisions cited supra at pg.2-5. Based, that the trial judge loss its jurisdiction or its core responsibility during the course of the Criminal Procedure Law (CPL) Sec.310.30, when failed to abide the language of the construction, interpretation and, mandatory provisions of the statute under CPL 310.30, as required by the Legislature intent (manner to disclose a jury's note during jury deliberation). e.g. see supra at pg.5 McKinney's Cons.Laws of New York Book 1, Statutes Sec. 171, provides that: MANDATORY PROVISIONS of the statute go to the jurisdiction

or authority of the person acting, and a compliance with them is a condition precedent to the validity of the action or determination under it. Where they prescribe a certain mode of procedure it **must** be strictly pursued, otherwise the whole proceeding is thereby rendered void. Therefore, petitioner is required immediate release from unlawful detained as law and justice require.

Since, this Honorable Court pursuant to the U.S.Constituion Art.III Sec.2 cl(2) has Appellate Jurisdiction both "as Law and Fact," is able to review Petitioner's Constitutional rights' claim, for which is able to make a final judgment from petitioner's criminal trial record that petitioner had attached to his petitioner under 2241(a)(c)(3) or see supra at pg.5-8. See cases related or similar to petitioner's case from this Court and State Courts, in regard of the language of the construction, interpretation and, mandatory provisions of the statute pursuant to CPL 310.30, see, *Roger v.U.S.*, 422 US 35, 95 S.Ct.2091, 2094-5; *Fillippon v. Albion Vein Slate Co.*,250 U.S. 76, 81 S.Ct. 435-6; *Shield v. U.S.*, 273 U.S. 583, 47 S.Ct.478; *U.S. v. Ronder*, 639 F. 2d 931, 934 (2d.Cir); *U.S.v.Schor*, 418 F.2d 26, 29-30 (CA2 1969); *United States v. Glick*, 463 F.2d 491, 493 (CA2 1972); *People v. O'Rama*, 78 NY2d 270; *People v. Silva*,24 NY3d 294, reag. denied 24 NY3d 1216; *People v. Kisoon*, 8 NY3d 129, 134-35.

HERE, Petitioner's trial record show on the face of the record that the trial judge disregarded the Criminal Procedure Law (CPL)' Statute including the erroneous application of the language of the mandatory provisions of the CPL 310.30 by suggesting to the jury to hear Mr. Washington's testimony, Officer McPartland's testimony, which allowed the jury to find petitioner guilty by a standard of proof that failed to meet the requirements of the Due Process Clause. Further, the trial judge's action can be construed that the jury were subjected to intimidation, thereby, can be construed as a mob domi-

nated trial. See Moore v. Dempsey, 261 US 86 (1923); Frank v. Mangum, 237 US 309 at 335.

Therefore, petitioner submits that it would be a terrible miscarriage of justice for the Court to denied a rehearing as well petitioner's writ under 28 USC sec.2241(a)(c)(3) without an opinion with respect to his Question Presented to the Court in his petition for a writ of habeas corpus. Otherwise it will amount to unconstitutional 'suspension' of the writ.

Please Take Judicial Notice, that this case was preserved for appellate review by trial counsel who made a contemporaneous trial objection, thereby his writ is not bar for review. See, U.S. v. Frady, 456 US 152; Wainwright v. Sykes 433 US 72 (1977) (Because, objection were not made).

CONCLUSION

For the foregoing reasons presented in this Motion for Rehearing and reasons set forth in his Original petition for writ of habeas corpus submitted to the Court and docket as No.17-6939, petitioner prays that this Court consider his Motion for Rehearing as law and justice require.

MAILED: Cert.Mail Return Receipt Requested #7016 3560 0000 2601 9558 as a proof of service.

DATED: Otisville New York
January 19, 2018

CC: ERIC T.SCHNEIDERMAN, Atty. General
New York State Office of the Atty.General
120 Broadway, New York, NY 10271

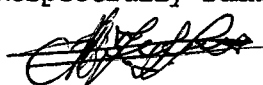
RICHARD A. BROWN, Queens County Dist.Attorney
125-01 Queens Blvd.,Kew Gardens, NY 11415

KATHLEEN G.Gerbing, Superintendent
Otisville Correctional Facility
57 Sanitorium Rd.,P.O.BOX 8
Otisville, NY 10963

I declare, certify, verify, or state under
the penalty of perjury, pursuant to 28 USC
1746 that the foregoing is true and correct.
EXECUTED DATED: 1/19/18

Masao Yonamine 88A7233

Respectfully submitted,


Masao Yonamine 88A7233
Petitioner Pro se
Otisville Corr. Facility
P.O.BOX 8
Otisville, NY 10963

Sworn to before me on this
19 day of January 2018

NOTARY PUBLIC

*Not Se readily available,
Carter v. Clark, 616 F.2d 228 (5th Cir. 1980)*

CERTIFICATE OF COMPLIANCE

No. 17-6939

IN THE
SUPREME COURT OF THE UNITED STATES

In re MASAO YONAMINE,

Petitioner,

vs.

KATHLEEN G. GERBING, Superintendent of Otisville
Correctional Facility, Otisville, NY 10963, Under
The jurisdiction Of Custody/Control Of New York
State Corrections and Community Supervision,

Respondent.

Pursuant to Rule 44.2 I hereby, certify that the foregoing Motion for Rehearing are presented in good faith and not for delay, and are restricted to the grounds specified in Rule 44.2.

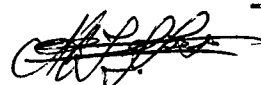
As require by the Supreme Court Rule 33.1(h), I certify that the Motion for an Order of Rehearing pursuant to the Supreme Court's Rule 44 of the United states contains 4,500 words, excluding the part of the petition that are exempted by the Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Otisville, New York
Jan. 19, 2018

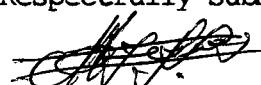
I declare, certify, verify, or state
under the penalty of perjury, pursuant to
28 USCA Sec.1746, that the foregoing is
true and correct.

EXECUTED ON DATE: 1/19/18



Masao Yonamine 88A7233

Respectfully submitted,



Masao Yonamine 88A7233
Petitioner Pro se
Otisville Corr. Facility
P.O.BOX 8
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**Additional material
from this filing is
available in the
Clerk's Office.**